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8 UNITED STATES DISTRICT COURT
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION

11 DONALD LEO MELLEIN,

12 Plaintiff,

13 v.

14 UNITED STATES OF AMERICA, et
15 al.,

16 Defendants.

No. 2:23-cv-07970-RGK-MAR

**[PROPOSED] ORDER GRANTING
LYNNE K. ZELLHART'S MOTION
TO DISMISS**

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18 The Motion to Dismiss ("Motion") filed by defendant Lynne K. Zellhart, having
19 come on for hearing, and the Court having considered the Motion, the Opposition, and
20 the Reply, the evidence presented, and oral argument thereon,

21 THE COURT HEREBY FINDS THAT:

- 22 1. The Motion is Granted.
- 23 2. Donald Mellein's ("Plaintiff's") claims against Agent Zellhart, Counts IV, V,
24 VI, VII, VIII, and IX are barred for the following reasons:
- 25 a. Counts IV (conversion and trespass to chattels), V (breach of bailment),
26 VI (negligence), and VII (Bane Act) are dismissed for failure to state a
27 claim and lack of jurisdiction in light of the United States' substitution
28 for Agent Zellhart pursuant to 28 U.S.C. § 2679(d)(2).

1 b. Counts VII and VIII, Plaintiff’s *Bivens* claims against Agent Zellhart,
2 are dismissed for failure to state a claim because they arise in a new
3 *Bivens* context and multiple special factors counsel hesitation against
4 extending implied individual tort liability to this new context. *See Egbert*
5 *v. Boule*, 596 U.S. 482 (2022). Even in a “conventional” Fourth
6 Amendment case, with “almost parallel” allegations to *Bivens* itself, the
7 Supreme Court now instructs courts to apply a special factors analysis,
8 asking whether “the Judiciary is at least arguably less equipped than
9 Congress to weight the costs and benefits of allowing a damages action
10 to proceed.” *Id.* at 492. Applying that analysis “in most every case,” the
11 Supreme Court stressed, leads to the same result: “no *Bivens* action may
12 lie.” *Id.* *Egbert* was recently reinforced in this Circuit in *Mejia v. Miller*,
13 61 F.4th 663, 669 (9th Cir. 2023) (“Under *Egbert*, rarely if ever is the
14 Judiciary equally suited as Congress to extend *Bivens* even modestly.”).
15 As the Ninth Circuit recently noted, “Essentially then, future extensions
16 of *Bivens* are dead on arrival.” *Harper v. Need*, 71 F.4th 1181, 1187 (9th
17 Cir. 2023).

18 i. Plaintiff’s claims against Agent Zellhart present a new context
19 different from *Bivens*. Plaintiff’s claims do not concern the arrest
20 of a person, but a property interest in a safe deposit box in a strip
21 mall and the mechanism of injury Plaintiff’s allege is a large scale
22 government operation as opposed to the acts of a single agent.

23 ii. Special factors counsel against the implication of a *Bivens*
24 remedy.

25 1. Plaintiff has alternative procedures for relief, such as the
26 FTCA or filing a report with the Office of Inspector
27 General. *See Vega v. United States*, 881 F.3d 1146, 1154
28 (9th Cir. 2018); *Egbert*, 596 U.S. at 497-98 (Border Patrol’s

1 investigation and grievance procedures provided alternative
2 remedy).

3 2. *Bivens* precludes holding Agent Zellhart responsible for
4 FBI policy and Plaintiff's claims seek to change FBI policy
5 to what they are demanding. *Ziglar v. Abbasi*, 137 S. Ct.
6 1843, 1860 (2017).

7 3. Plaintiff's *Bivens* claims would cause disruptive intrusion
8 into the Executive Branch. *Abbasi*, 137 S. Ct. at 1861.

9 4. Existing legislation suggests that the absence of a monetary
10 remedy in this circumstance is more than inadvertent. *Id.* at
11 1862.

12 c. In the alternative, Counts VII and VIII, Plaintiff's *Bivens* claims against
13 Agent Zellhart, are dismissed for failure to state a claim as Agent
14 Zellhart is entitled to qualified immunity.

15 i. Plaintiff fails to allege a claim for judicial deception against Agent
16 Zellhart. The omission of the Government's forfeiture
17 preparations did not create a false impression in light of the scope
18 of criminality detailed in the affidavit.

19 ii. It is not clearly established that the inventory search was
20 unconstitutional. [M]otivation [] cannot reasonably disqualify an
21 inventory search that is performed under standardized procedures
22 for legitimate custodial purposes." *United States v. Lopez*, 547
23 F.3d 364, 372 (2d Cir. 2008) (citations omitted).

24 d. Counts VII and VIII, Plaintiff's *Bivens* claims against Agent Zellhart,
25 are dismissed for failure to state a claim as they are barred by the two-
26 year *Bivens* statute of limitations. *Green v. Tennessee Valley Auth.*, 2006
27 WL 8439729 at *1 (C.D. Cal. Apr. 21, 2006) ("The Ninth Circuit applies
28 the state statute of limitations for personal injury to *Bivens* claims. In

1 California the statute of limitations for personal injury is currently two
2 years.”). All of the conduct concerning Agent Zellhart that Plaintiff
3 alleges occurred more than two years prior to the filing of the Complaint.

4 e. Count IX, entitled “as-applied deprivation of property without due
5 process of law under the Fifth Amendment Due Process Clause,” is
6 dismissed because it fails to state a claim. If interpreted as asserting a
7 constitutional violation, it is dismissed for failure to state a claim for the
8 same reasons Plaintiff’s *Bivens* claims must be dismissed.

9 IT IS HEREBY ORDERED that the Motion is granted and that Plaintiff’s claims
10 against Agent Zellhart are dismissed without leave to amend and Agent Zellhart is
11 dismissed from the First Amended Complaint.

12 IT IS SO ORDERED.

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14 Dated: _____

15 THE HONORABLE R. GARY KLAUSNER
16 United States District Judge
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